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BOARD OF ENVIRONMENTAL PROTECTION

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July 20, 2004

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RE: Appeal of Water Quality Certification in the Matter of
FPL Energy Maine Hydro, LLC Flagstaff Storage Project #L-19313-32-G-N

Dear Mr. Cadot and Mr. Webber:

Enclosed, please find your copy of the Board of Environmental Protection's decision regarding the appeal submitted by you behalf of Maine Rivers, Trout Unlimited, Appalachian Mountain Club the Natural Resources Council of Maine, and the Town of Eustis regarding the above referenced Department Order.

This decision may be appealed by filing a petition in Superior Court within 30 days after receipt of notice of the decision if you are a party to the proceeding, and within 40 days of the date of the decision if you are not a party. For legal guidance on a petition to Superior Court, you should consult 5 M.R.S.A. Section 11001 et. seq. and Rule 80C of the Maine Rules of Civil Procedure.

Sincerely,

Terry Hanson
Board of Environmental Protection

Enclosure: Board Order / In the Matter Of:
Facilitators Improving Salmonid Habitat

cc: Richard E. Wardwell, Chair BEP, w/out enclosures
Jon Edward, Assistant Attorney General w/out enclosure
Cynthia S. Bertocci, BEP Executive Analyst w/out enclosure
Dana P. Murch, DEP Project Manager Bureau of Land and Water Quality w/enclosure
Matthew Manahan, Pierce Atwood w/enclosure cert. Mail: 7099-3220-0006-8727-4011
Interested Parties, w/cover memo and draft order only



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STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION
STATE HOUSE STATION 17
AUGUSTA, MAINE 04333

BOARD ORDER

IN THE MATTER OF

FPL ENERGY MAINE HYDRO LLC) WATER QUALITY CERTIFICATION
Spring Lake Twp., Carrying Place Twp.,)
Dead River Twp., Bigelow Twp., Flagstaff Twp.)
& Town of Eustis)
Somerset and Franklin Counties)
)
FLAGSTAFF STORAGE PROJECT) FINDINGS OF FACT AND ORDER
#L-19313-32-G-N) ON APPEAL

Pursuant to the provisions of 38 MRSA Section 341-D and 06-096 CMR Chapter 2 (Rules Concerning the Processing of Applications and Other Administrative Matters), the Board of Environmental Protection has considered the appeal by MAINE RIVERS, TROUT UNLIMITED, APPALACHIAN MOUNTAIN CLUB, and NATURAL RESOURCES COUNCIL OF MAINE of the Department's approval of the application of FPL ENERGY MAINE HYDRO LLC for water quality certification for the operation of the Flagstaff Storage Project. Water quality certification by the Board is required under the federal Clean Water Act and parallel state laws in order for the project to be licensed by the Federal Energy Regulatory Commission. Based on a review of the materials submitted by the appellant, the applicant, and other interested parties, and a review of the application with its supportive data, agency review comments, and other related materials on file, the Board FINDS THE FOLLOWING FACTS:

1. PROCEDURAL HISTORY

The Flagstaff Storage Project consists of a dam (Long Falls Dam), a reservoir (Flagstaff Lake), and appurtenant facilities located on the Dead River in the unorganized territories of Spring Lake Township (T3 R4 BKP WKR), Carrying Place Township (T2 R3 BKP WKR), Dead River Township (T3 R3 BKP WKR), Bigelow Township (T4 R3 BKP WKR), Flagstaff Township (T4 R4 BKP WKR), and the Town of Eustis, Somerset and Franklin Counties, Maine. The dam was constructed during the period of 1948-1950 for the purposes of flood control, enhancing log driving, and electric generation by downstream owners. Prior to dam construction, there was a lake in this stretch of river, but it was much smaller in area. The Flagstaff Project is operated on an annual cycle, in conjunction with the Brassua Lake and Moosehead Lake storage reservoirs, to regulate flows in the Kennebec River.

The project was originally licensed to Central Maine Power Company (CMP) by the Federal Power Commission (now the Federal Energy Regulatory Commission, or FERC) on April 12, 1979, with an expiration date of December 31, 1997. FPL Energy acquired the project from CMP in 1999.

On December 20, 1996, CMP filed an application with the Department for Water Quality Certification for the continued operation of the Flagstaff Storage Project. Certification was requested in conjunction with CMP's application for a new license from FERC for the project. The application for certification was subsequently withdrawn and re-filed on December 17, 1997, December 15, 1998, December 15, 1999, November 16, 2000, November 16, 2001, and November 15, 2002.

By Order #L-19313-32-G-N dated November 14, 2003, the Department approved water quality certification for the continued operation of the Flagstaff Storage Project subject to a number of conditions.

On December 9, 2003, Maine Rivers, Trout Unlimited, Appalachian Mountain Club, and the Natural Resources Council of Maine (hereafter referred to collectively as "non-governmental organizations" or NGOs) filed a timely appeal of the Department's order. The Town of Eustis also filed an appeal and requested a public hearing.

On January 8, 2004, FPL Energy filed a timely response to the NGOs' appeal. Timely responses were also filed by numerous interested parties, including the U.S. Environmental Protection Agency (EPA) in a letter dated December 22, 2003.

By letter dated February 27, 2004, EPA submitted additional comments concerning FPL Energy's response to the appeal. By letter dated March 16, 2004, FPL Energy responded to EPA's additional comments.

2. APPLICABLE STANDARDS FOR APPEAL

Title 38 Section 341-D(4) provides that, in acting on an appeal, "the Board is not bound by the Commissioner's findings of fact or conclusions of law but may adopt, modify or reverse findings of fact or conclusions of law established by the Commissioner." The Board is required to make its own findings and draw its own conclusions based upon the record before it, as well as its interpretation and application of the relevant law, but without deference to the Commissioner's underlying decision, findings or conclusions. Section 24(B)(7) of the Department's Chapter 2 Rules provides that, "the Board shall, as expeditiously as possible, affirm all or part, affirm with conditions, order a public hearing to be held as expeditiously as possible, or reverse all or part of the decision" that has been appealed to the Board.

3. STANDING

In its response to the appeal, FPL Energy argues that the NGOs do not have standing to file an appeal because, FPL Energy asserts, none of them has shown any property, pecuniary, or personal rights that could be affected by the Department's action.

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The record shows that Maine Rivers is a non-profit corporation organized under the laws of the State of Maine whose mission is to protect, restore and enhance the health and vitality of Maine's rivers.

Trout Unlimited is a non-profit corporation organized under the laws of the State of Maine whose mission is to conserve, protect and restore North America's coldwater fisheries and their watersheds.

Appalachian Mountain Club is a non-profit corporation organized under the laws of the State of Maine whose mission is to promote the protection, enjoyment, and wise use of the mountains, rivers and trails of the Appalachian region.

Natural Resources Council of Maine is a non-profit corporation organized under the laws of the State of Maine whose mission is to protect, conserve, and restore Maine's environment.

Chapter 2, section 24(B)(1) of the Department's rules provides that any aggrieved person may appeal to the Board for review of a Commissioner's decision. Sections 1(B) and 1(O) of the Chapter 2 Rules further define "aggrieved person" as any individual, partnership, corporation, government entity, association, or public or private organization of any character that the Board determines may suffer particularized injury as a result of a licensing or other decision. The NGOs have provided evidence that they each have members who have used Flagstaff Lake and the Dead River for fishing, hunting and boating. These uses are affected by the operation of the Flagstaff Storage Project and the resulting water levels on Flagstaff Lake.

Accordingly, the Board finds that the NGOs have standing to bring this appeal.

4. BASIS OF APPEAL

Section 401 of the Federal Water Pollution Control Act (33 U.S.C. section 1251 et seq.) requires any applicant for a federal license to obtain a certification that the proposed activity will comply with applicable state water quality standards. In general, the NGOs contend that, in issuing the water quality certification, the Department failed to apply legally pertinent water quality standards with respect to the establishment of the allowable winter drawdown of Flagstaff Lake and, consequently, that the certification does not meet these standards.

Specifically, the NGOs object to the findings and conclusions of the Department's order regarding the designated uses of the lake for habitat for fish and fishing, and habitat for aquatic life. They contend that the winter drawdown limit approved by the Department (24 feet below full pond, with drawdowns of up to 36 feet when needed for flood control) is inconsistent with applicable Class C water quality standards for maintaining the lake's

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resident biological community. They note that evidence in the record shows that, with a 24 foot drawdown, only 13% of the volume, and 33% of the area, of the lake would remain. With a drawdown of 36 feet, only 5% of the lake volume, and 1% of the area, would remain (17,950 acres at full pond, compared with 137 acres under the maximum drawdown allowed by the Department's order). They argue that in order to meet Class C habitat and aquatic life standards, any drawdown must adequately protect the littoral zone and volume of the lake, and that a drawdown of 24 feet or more would eliminate, not protect, the littoral zone. Appellant NGOs also contend that both the Department and the United States Environmental Protection Agency (EPA) have for many years consistently expressed and applied the view that significant drawdowns of the lake are inconsistent with applicable State water quality standards as approved by EPA pursuant to the federal Clean Water Act.

The NGOs further contend that, in granting the water quality certification, the Department employed a new water quality standard, that has not been approved by EPA as required by federal law. By comparing Flagstaff Lake to other impoundments with similar drawdowns, the Department effectively created an unauthorized subclassification under Class C Water Quality Standards for lakes used for hydropower, a new standard that requires EPA approval under the federal Clean Water Act (33 USC § 1313; 40 C.F.R. section 131.21) that has not been granted. They argue that, in the case of Flagstaff Lake, application of a comparison only to other lakes experiencing similar drawdowns, and the resultant drawdowns authorized by the Department, effectively remove aquatic life habitat as a designated use of the water body. The NGOs further argue that, under applicable federal and state law, a use attainability analysis (UAA) is the necessary mechanism to determine whether non-attainment of Class C standards is justified.

The NGOs also contend that, even if the impoundment-to-impoundment assessment is characterized, as the Department has, as a "new interpretation" of existing water quality standards, as opposed to a change in the standards, that interpretation departs so dramatically from past interpretations and applications of the law by the Department as to result in a de facto new standard that requires a use attainability analysis and EPA approval. The NGOs cite Department staff memoranda and correspondence from DEP senior management over an extensive period of years stating concerns about the extent of the drawdown of Flagstaff Lake and the resulting noncompliance with Class C aquatic life standards, together with the need to conduct a use attainability analysis under 38 MRSA section 464(2-A) and 40 CFR section 131 to establish drawdown limits that appropriately balance environmental, economic, and social benefits of the Flagstaff Storage Project. In this, the point has been repeatedly made, not that the proposed drawdown is necessarily unacceptable, but that the process for considering it entails a UAA and EPA approval.

Appellant NGOs request that the Board reverse the Department's action and deny water quality certification for the Flagstaff Storage Project until a use attainability analysis is conducted pursuant to state and federal law in order to make a legally valid determination of

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whether the non-attainment of Class C water quality standards is justified pursuant to these laws.

5. APPLICANT'S RESPONSE TO NGOs' APPEAL

In response to the appeal, FPL Energy argues that the Department has not created a new subclass of water quality standard, but rather has brought its interpretation of the existing standard into conformance with the intent expressed by the Maine Legislature. FPL Energy argues that, although there is a dispute over the meaning of the Class C standard for hydropower impoundments, it believes that the Legislature has stated that such hydropower impoundments should not be held to a "natural" standard. In support of this position, FPL Energy cites P.L. 1992, chapter 813, § A-1 (L.D. 2159), which was enacted by the Legislature in 1992 as an amendment to 38 MRSA § 464 (9).¹ In addition, FPL Energy cites Resolves 2003, Chapter 37, which directs the Department to compare a water storage reservoir to other reservoirs with drawdowns of similar magnitude when assessing compliance with the aquatic life standard.² FPL Energy argues that this impoundment-to-impoundment comparison, as employed by the Department in this instance, is the only "rational benchmark for comparison."

¹ Chapter 813 created a subcategory for all existing impoundments with water level fluctuations that had a significant effect on habitat and aquatic life. Shortly after its enactment, EPA notified the State that it could not accept the statute's "generic downgrading of existing impoundments below the Class C aquatic life criteria" without the undertaking of a use attainability analysis, and disapproved the change in standard. In response, the Legislature further amended 38 MRSA § 464 (9) (P.L. 1993, chapter 344) so that it applied *only* to the Ripogenus impoundment and this enactment was approved by EPA for Ripogenus on the basis of a use attainability analysis for the unique conditions of that specific water body. This subcategory contains less stringent criteria than the Class C criteria applicable to Flagstaff Lake, although the interpretation of Class C standards proposed in the Department's certification signifies what is tantamount to the application of this EPA-disapproved standard to all significantly fluctuating impoundments.

² Resolve 2003, chapter 37 (LD 1059) requires the Department to initiate rulemaking that would "require that the structure and function of the resident biological community that must be maintained in a water storage reservoir is the structure and function that would be expected to exist in a water storage reservoir with a drawdown of similar magnitude." This resolve altered Class C standards for such impoundments in essentially the same way as the EPA-disapproved P.L. 1992, chapter 813, that being one that requires that the structure and function of the community be comparable to that which exists in an impoundment with a similar drawdown. Prior to its enactment, EPA notified the Department that, "EPA could not approve the [then proposed law LD 1059], and the changes would not be effective for Clean Water Act purposes unless and until ... UAAs are conducted which demonstrate that the current more stringent criteria cannot be attained ..." It is important to note that the Department's first draft of its certification, which was based upon this law, was withdrawn because this standard had not been approved and therefore it was not in legal effect. Thus, the Department issued a draft certification, which relied upon the newly enacted Chapter 37, and was notified by EPA that Chapter 37 was "not in effect for federal law purposes and cannot be relied upon for the § 401 certification." Without citing Chapter 37, the subsequently issued certification under appeal employs the same reasoning and direction as Chapter 37.

FPL Energy further argues that the Department's Hydropower Project Flow and Water Level Policy, dated February 2002, (which uses wetted conditions in 75% of the littoral zone as an initial point of comparison when assessing attainment of the aquatic life and habitat standard) is not established in rule. Therefore, the change in interpretation of the standard from that stated in the policy to an impoundment-to-impoundment comparison is within the Commissioner's authority. However, there is no dispute that an impoundment-to-impoundment comparison is a departure from DEP's long established, past practice. Rather, FPL Energy argues that the Department's new interpretation, even though based upon the new but yet-unapproved standard set by Resolves 2003, Chapter 37, does not actually require a change in statute and, therefore, is not subject to approval by EPA.

FPL Energy also argues that, even if the Department's previously held standard were applied, Flagstaff Lake would meet the standards for fish and aquatic life. FPL Energy cites sampling data that macroinvertebrates are present throughout the reservoir in all seasons. Additionally, a peer review of data comparing the aquatic life of Flagstaff to natural lakes with similar drawdowns concludes that the aquatic community in Flagstaff Lake "is functioning as would be expected under existing conditions." However, even this analysis depends upon a new standard of comparison, as embraced by Chapter 37, which is not in legal effect.

FPL Energy also argues that, because there is no discharge of a "pollutant" from or into the Flagstaff Storage Project, the resident biological community by definition meets the standards.

Finally, FPL Energy argues that a use attainability analysis is not required, not only because it believes Class C standards for aquatic life are met, but also because there is no assurance of the outcome and any further restrictions on the designated use of hydroelectric power generation (beyond those associated with current operations) which may be suggested by such an analysis would be contrary to the State's antidegradation policy (38 MRSA. section 464(4)(F)).

6. EPA's POSITION ON THE WATER QUALITY CERTIFICATION

EPA has been involved in the environmental review of Flagstaff Lake since at least 1995, and has consistently raised concerns over, among other things, the project's impacts on aquatic life under Class C standards, taking the position that the effects of the dramatic drawdowns require consideration under the UAA process. In two letters to the Board in this proceeding, EPA stated clearly and emphatically that the certification should be denied without prejudice and that a proper evaluation under the UAA process must be conducted before certification can be lawfully granted for this proposal. EPA's position is that the certification either represents conclusions "completely unsupported by the facts, or a new interpretation of state law that is tantamount to a revised water quality standard, which may not be implemented for federal law purposes [which includes a water quality certification]

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unless and until approved by EPA.” EPA also attended and testified at the Board’s meeting at which this appeal was heard, and stood in strong objection to the Department’s tantamount change in Class C standards as manifested by the appealed certification.

In 1992, EPA disapproved 38 MRSA § 464 (9) (P.L. 1992, chapter 813), which created a subcategory of the habitat and aquatic life use for GPA waters that contained lower than Class C criteria, bypassing federal law requiring a use attainability analysis to determine if a downgrading of standards was justified. In response to EPA’s action, the Legislature subsequently revised § 464 (9) (in P.L. 1993, chapter 344) and retained the subcategory below Class C for waters, like Ripogenus, that had demonstrated, after an EPA approved use attainability analysis, that Class C criteria could not be met.

In early 2003, prior to the enactment of Resolves 2003, Chapter 37, which changed the definition of “resident biological community” and created a new definition of “water storage reservoir,” EPA notified the Department that this law would not be approvable and could, therefore, not be used as a basis for water quality certifications, unless and until a use attainability analysis was conducted and demonstrated that the current criteria could not be attained. In its letters and presentation before the Board, EPA stressed that the Department’s new interpretation of the Class C criteria, comparing the resident biological community of an existing impoundment to that which could be expected in an impoundment with a similar drawdown, does not differ in any meaningful way from the “what you see is what you get” standard in P.L. 1992, chapter 813, which EPA disapproved in the absence of a use attainability analysis.

Under the interpretation of Class C standards embodied in the Department’s certification, EPA stated that, “Class C criteria for a particular impoundment would be satisfied as long as the structure and function of the resident biological community, no matter how poor the habitat and how depauperate the fauna, is what could be expected in an impoundment with a similar drawdown. This interpretation effectively eliminates any meaningful criteria, and is inconsistent with the CWA.”³

7. ANALYSIS

As noted above, Flagstaff Lake is classified as a Class GPA water body. By law, Class GPA waters shall be of such quality that they are suitable for various designated uses, including habitat for fish and other aquatic life. Pursuant to 38 MRSA Section 464(9), existing hydropower impoundments which are classified as GPA, but which do not satisfy the habitat and aquatic life standard for GPA, must, at a minimum, meet the Class C aquatic life criteria

³ The Attorney General’s Office concurs with EPA’s analysis and so informed the Board at its meeting when the appeal was considered.

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set forth in 38 MRSA section 465(4)(C), provided that when the actual quality of the impounded waters attains more stringent characteristics or criteria, existing water quality is maintained and protected.

Under provisions of 38 MRSA section 465(4)(C), "discharges to Class C waters may cause some changes to aquatic life, provided that the receiving waters shall be of sufficient quality to support all species of fish indigenous to the receiving waters and maintain the structure and function of the resident biological community."

"Resident biological community" is defined as the "aquatic life expected to exist in a habitat which is free from the discharge of any pollutant. This shall be established by accepted biomonitoring techniques." (38 MRSA Section 466(10)).

Under 40 CFR section 131.21, all existing EPA-approved State water quality standards remain applicable "until EPA approves a change, deletion, or addition to that water quality standard."

While the Department has rules (Chapter 579) for determining attainment with aquatic life standards for rivers and streams, no rules exist for assessing compliance with Class C standards in lakes. In the absence of such rules, the record shows that the Department has conducted a case-by-case assessment of the impact of a proposed project, applying professional judgment and using natural lakes as an initial point of comparison or reference community. While not a rule, under the Department's Hydropower Project Flow and Water Level Policy, maintaining 75% of the littoral zone in a wetted condition is presumed to protect aquatic life, with departures from this condition made on a case-by-case basis using site specific data and circumstances. In the case of Flagstaff Lake, the Department has historically (including prior to its articulation of the above stated policy) classified Flagstaff as non-attainment for aquatic life due to the drawdown regime, because of the extensive dewatering of the littoral zone and the absence of a benthic community at a large percentage of the sites sampled around the impoundment. The Department's historic and longstanding interpretation of Class C standards, when applied to Flagstaff and other, similar impoundments, and its parallel stated concerns about the extensive drawdown of the lake and the impact of these drawdowns on aquatic life, is reflected in the Department's inclusion of Flagstaff Lake since at least 1998 on the Clean Water Act 305(b)/303(d) list of lakes impaired for aquatic life due to drawdowns.

The Department's longstanding interpretation and application of the Class C standard has led it to recommend at various times over the years limiting winter drawdowns of Flagstaff to between four and eleven feet to protect aquatic life in order to meet Class C standards, in the absence of a use attainability analysis justifying a lower standard. It is widely understood that limits in this range could have impacts on the designated use of hydroelectric power generation. In response to this apparent conflict between attainment of various designated

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uses, the record shows that the Department has long informed the applicant and its predecessor, Central Maine Power, that it must conduct a use attainability analysis to either remove the designated use of aquatic life if it cannot be met or adopt a new subclassification with lowered standards for widely fluctuating hydropower impoundments like Flagstaff. The record shows that neither EPA, the Department nor the NGO appellants have stated categorical opposition to the proposed water level regime but only have adhered to the view, with which this Board agrees, that approval under Class C standards of such a regime requires a process that has not been undertaken here.

The Board takes notice of the fact that the Legislature has, on at least two occasions, indicated its intent, under state law, to treat hydropower impoundments differently than natural lakes when assessing compliance with water quality standards. However, legislation enacted in 1992 (P.L. 1992, chapter 813), deeming habitat characteristics and aquatic life criteria in impoundments with significant water level fluctuations to be met if, among other things, the structure and function of the *there and then existing* resident biological community in the impoundment is maintained, was disapproved by EPA as being inconsistent with federal law requiring a UAA for this lowered water quality standard. EPA found the 1992 law to be, in effect, a "what you see is what you get" standard and, consequently, a downgrading of the otherwise applicable Class C standard. The following year this law was repealed by the Legislature because of EPA's disapproval, and it was re-enacted as applicable only to the Ripogenus Project, for which EPA had approved a UAA and a downgrading of the applicable water quality standard.

More recently, the Legislature enacted Resolves 2003, Chapter 37 to direct the Department to compare a water storage reservoir to another water storage reservoir with a drawdown of similar magnitude when assessing impacts to the resident biological community. In comment to the Department and the Board, EPA indicated that this change in water quality standards applicable to such impoundments is essentially the same as P.L. 1992, chapter 813, § 1-A in effect a "what you see (or what you would expect) is what you get" standard. As a revision or change of an existing water quality standard, this change requires EPA approval before becoming effective. Maine's Office of the Attorney General concurs with EPA's legal position. EPA has further stated that Resolves 2003, Chapter 37 will likely not be approved in the absence of a UAA (use attainability analysis).

Nevertheless, the Department's order in this matter employed an impoundment-to-impoundment comparison, as suggested by Resolves 2003, Chapter 37, and found that "the structure and function of the resident biological community in Flagstaff Lake is the structure and function that would be expected to exist in a water storage reservoir with a drawdown of similar magnitude." The order went on to conclude that, with a drawdown of 24 feet (and greater during periods of excessive snowpack or precipitation), the waters of Flagstaff Lake "will be suitable for the designated use of habitat for aquatic life," notwithstanding the extensive dewatering of the littoral zone. The order did not explain how such a loss of water

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and reduction in littoral habitat is consistent with the Class C standard. Rather, the order found that a drawdown of less than the proposed 24 feet would "not protect all existing and designated uses, including hydroelectric power generation and flood control."

The Board finds that there is insufficient basis in the currently applicable and EPA-approved water quality standards, as set forth in 38 MRSA sections 465(4) or 465-A(1), to re-interpret water quality standards to allow storage reservoirs to be compared to other impoundments with similar drawdowns. The impoundment-to-impoundment comparison, which compares one disturbed site to a similarly disturbed site, constitutes a dramatic change in the Class C standard and, as such, legally requires the approval of EPA prior to implementation in accordance with provisions of the federal Clean Water Act, a fact that EPA has clearly articulated. The Board further finds that where there is a conflict between attainment of various designated uses of a waterbody, in a manner that a designated use cannot be met, the UAA process is the legally appropriate and necessary mechanism for removing a designated use or adopting a subclassification of designated use that allows less stringent criteria.

The applicant also argues that Flagstaff Lake, under its proposed management regime, would meet the Class C standard if compared to natural lakes, as opposed to impoundments, with similar drawdowns. The applicant cites the Peer Review Final Report Quantitative Comparison Study of the Near-Shore Macroinvertebrate Communities at Flagstaff Lake, Attean Pond and Second Musquacook Lake, dated February 1999, as evidence that the structure and function of the resident biological community of Flagstaff Lake would be maintained at a winter drawdown of 24 feet. However, this report concludes that "Flagstaff is functioning as would be expected under existing conditions." The Board finds that this comparison is also a significant departure from past and longstanding practice, interpretation and application of the applicable water quality standards. Further, the appropriateness of the comparison across lakes with morphologies very different from that of Flagstaff is uncertain.

With respect to the applicant's argument that a hydropower project would by definition meet the standards for resident biological community because there is no discharge of a pollutant, the Board finds that this reading of the law is too narrow and is inconsistent with a long line of FERC, EPA and DEP interpretations of the applicable laws vested in them. Indeed, the reason that FERC requires water quality certification for the relicensing of this project, and the reason that the Department took action upon it, all as consistent with other, similar projects across the state and the nation, stand as testament to the fact that the law requires certification. The absence of a pollutant does not ensure certification nor does it constitute compliance with the aquatic life standard. Rather, with respect to assessing compliance with the aquatic life standard, the comparison must be, at a minimum, to a "habitat which is free from the discharge of any pollutant."

Finally, with respect to the argument that the state's antidegradation policy mandates the status quo with respect to hydroelectric power generation, the Board finds that such a reading

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of the statute elevates one protected use above others. Moreover, this argument ignores the fact that the use attainability analysis provides a process for allowing changes in otherwise applicable water quality standards. It does not follow that any change in the operation of the Flagstaff Storage Project that might be recommended as the result of a use attainability analysis would necessarily constitute non-attainment of the use of hydroelectric power generation or would violate the antidegradation policy.⁴ Furthermore, the outcome of the UAA process may be to permit continued operation of the project in the current manner.

Based on the above Findings of Fact, the Board concludes that:

1. EPA has authority under the Clean Water Act to approve the revision of, or adoption of new, state water quality standards.
2. In approving the Water Quality Certification for the Flagstaff Storage Project, the Department departed significantly from its past interpretation and application of the EPA-approved standard by employing an impoundment-to-impoundment comparison, which in statutory form had been previously disapproved by EPA in 1992, and which EPA again advised it would likely not approve in 2004. Whether the change in assessment is characterized as a change in the standard or a change in the interpretation of the standard, there is no dispute that it is a dramatic change from past practice with a significant effect on the meaning of what constitutes minimum aquatic life standards for attaining compliance with Class C standards. Given that EPA has authority under the Clean Water Act to approve state water quality standards, the Board must conclude, as determined by EPA, that the implementation of this new standard is subject to EPA approval, which has not been granted.
3. Given the morphology of Flagstaff Lake, assessing Class C standards by comparing Flagstaff to another lake or lakes having similar vertical drawdowns, produces dramatic results which would sanction dewatering a large percentage of this and other lakes and potentially eliminating the designated use of aquatic life, all without using the UAA process. This stands in stark contrast to the Department's prior and long-held views, expressed by both the Department's management and technical staff that one should maintain a meaningful amount of the littoral zone in a wetted condition in order to meet the aquatic life standard of Class C. The Board concludes that taking this position would significantly undermine the meaningfulness of Class C aquatic life standards, which would have grave implications in other contexts.

⁴ In *S.D. Warren Company vs. Maine Department of Environmental Protection and Board of Environmental Protection*, Warren argued that a reduction in power generation would violate the State's antidegradation policy. The Superior Court found that "[e]ven though hydropower generation may be reduced...it will still be 'maintained and protected' as required by the state's antidegradation policy." The Court noted that hydropower is just one of the many existing and designated uses that must be protected in the subject waters. *S.D. Warren v. MDEP*, AP-03-70 (Me. Super. Ct., Cum. Cty., May 4, 2004)(Cole, J.)

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4. Both federal and state law provide a mechanism, the use attainability analysis, for creating and federally approving a water subclassification if necessary to balance all of the important environmental, economic and social uses of an impoundment.
5. The Board finds that, in order to grant certification for the project as proposed, the Department should either obtain EPA approval of its impoundment-to-impoundment comparison as embraced by the recently enacted Resolves 2003, Chapter 37, or the applicant should conduct a use attainability analysis. Pending such actions, the Board makes no findings or conclusions regarding the allowable winter drawdown of Flagstaff Lake, except that it must, on this record and the currently applicable law, deny certification without prejudice.
6. Given that the order under appeal establishes a significantly different standard for assessing compliance with the Class C standard for aquatic life, which has not been approved by EPA in accordance with the Clean Water Act, there is no reasonable assurance that the applicant's proposal to manage water levels in Flagstaff Lake will be adequate to ensure that the waters of Flagstaff Lake will be suitable for the designated use of habitat for aquatic life under Class C standards and that all applicable standards for these waters will be satisfied.
7. Given that the Board is denying, without prejudice, FPL Energy's application for a water quality certification on the bases stated above, there is no need to consider at this time the Town of Eustis' appeal of the same order. The concerns raised by the Town can be considered in any use attainability analysis that may be forthcoming in support of FPL Energy's reapplication.

THEREFORE, the Board GRANTS the appeal by Maine Rivers, Trout Unlimited, Appalachian Mountain Club, and the Natural Resources Council of Maine and DENIES without prejudice the application of FPL ENERGY MAINE HYDRO LLC for Water Quality Certification for the operation of the Flagstaff Storage Project.

DONE AND DATED AT AUGUSTA, MAINE, THIS 15th DAY OF July, 2004.

BOARD OF ENVIRONMENTAL PROTECTION

BY:



Richard E. Wardwell, Chair

FLAGSTAFF STORAGE PROJECT
#L-19313-32-G-N

FINDINGS OF FACT AND ORDER
ON APPEAL

PLEASE NOTE ATTACHED SHEET FOR BOARD RECONSIDERATION AND JUDICIAL
REVIEW PROCEDURES

VL-19313-32-G-N appeal

Given that the Board is denying without prejudice FPL Energy's application for a water
quality certification on the basis stated above, it is not to consider at this time the
Town of Lantz' appeal of the same order. The concerns raised by the Town can be
addressed in any future administrative actions that may be forthcoming in support of FPL
Energy's application.

Given that the Board is denying without prejudice FPL Energy's application for a water
quality certification on the basis stated above, it is not to consider at this time the
Town of Lantz' appeal of the same order. The concerns raised by the Town can be
addressed in any future administrative actions that may be forthcoming in support of FPL
Energy's application.

THEREFORE, the Board GRANTS the appeal by Maine Rivers, Trout Unlimited, Appalachian
Mountain Club, and the National Resources Council of Maine and DENIES without prejudice the
application of FPL ENERGY MAINE HYDRO LLC for Water Quality Certification for the
operation of the Flagstaff Storage Project.

DOING AND DATED AT AUGUSTA MAINE THIS 12th DAY OF July 2002

BOARD OF ENVIRONMENTAL PROTECTION

BY: 
Richard E. Wards, Chair